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In the Supreme Court of the United States

OCTOBER TERM, 1995

HOLLY FARMS CORPORATION, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

FREDERICK L. FEINSTEIN
General Counsel
LINDA SHER
Associate General Counsel
NORTON J. COME
Deputy Associate General Counsel
JOHN EMAD ARBAB
Attorney
National Labor Relations Board
Washington, D.C. 20570

DREW S. DAYS, III
Solicitor General
LAWRENCE G. WALLACE
Deputy Solicitor General
RICHARD H. SEAMON
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Petitioners' "live haul" crews—which consist of chicken catchers, forklift operators, and live haul drivers—collect broiler chickens that have been raised by independent contract growers and transport them to petitioners' processing plant. The question presented is whether the National Labor Relations Board reasonably concluded that those workers are not "agricultural laborer[s]" excluded from the coverage of the National Labor Relations Act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A78) is reported at 48 F.3d 1360. The decision and order of the National Labor Relations Board (Pet. App. A79-A205) and the decision of the administrative law judge (Pet. App. A206-A935) are reported at 311 N.L.R.B. 273. The Board's decisions in the representation proceeding (J.A. 17a-23a, 33a-45a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 10, 1995. A petition for rehearing was denied on May 9, 1995. Pet. App. A936-A938. The

petition for a writ of certiorari was filed on August 4, 1995, and was granted on November 6, 1995, limited to the fifth question presented by the petition. Joint Appendix (J.A.) 46a. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

1. Prior to July 1989, petitioner Holly Farms Corporation was engaged in the production, processing, and transportation of poultry. Pet. App. A5. On July 18, 1989, petitioner Tyson Foods, Inc. (Tyson), acquired 100% of the stock of Holly Farms, making it a wholly owned subsidiary of Tyson. *Id.* at A4, A11, A61, A715.[1] The issue before this Court concerns employees at Holly Farms' facility in Wilkesboro, North Carolina, *id.* at A230-232, which is a "vertically integrated poultry operation." *Id.* at A39. Operations at the Wilkesboro facility involve two kinds of chickens: "pullets," which are used for breeding; and broiler chickens, which are destined for human consumption. J.A. 5a, 7a, 12a, 15a. Although the employees at issue here are involved only with broiler chickens, some understanding of the processes involving each type of chicken is necessary.

Holly Farms purchases about 80% of its baby pullets from breeder companies and hatches the other

[1] In a ruling that was upheld by the court of appeals and is no longer at issue, the National Labor Relations Board found that petitioner Tyson became a successor to petitioner Holly Farms as of July 18, 1989. Pet. App. A13-A27, A110-A114. For convenience, hereafter we sometimes refer to petitioners collectively as "Holly Farms," even when discussing ongoing events that both precede and follow the date of successorship.

20% in its own hatchery. J.A. 7a-8a, 20a. The baby pullets (whatever their source) are taken, when one or two days old, to the farms of independent growers, who raise them to 20 weeks of age. J.A. 9a. When the pullets are 20 weeks old, they are taken from the growers' farms to "laying houses" also owned by independent farmers. J.A. 9a. The workers who catch the pullets and transport them from the growers' farms to the laying houses are called "pullet movers," J.A. 9a, 20a, or "pullet haulers," *e.g.*, J.A. 43a. The farmers who own the laying houses collect the eggs from the pullets and put the eggs into cartons. J.A. 10a. The cartons of eggs are transported by "egg haulers" from the independent laying houses to Holly Farms' hatchery facility. *Ibid.*

At Holly Farms' hatchery, the eggs are hatched and the new chicks are vaccinated and have their beaks trimmed. J.A. 11a-12a. Some of those chicks are designated as broilers. J.A. 12a. The broiler chicks are delivered, when newly born, to the farms of independent contract growers by "chick delivery boys." J.A. 12a-13a. The independent growers raise the broiler chicks to 49 days of age. J.A. 13a.[2] It is

[2] The contract between Holly Farms and the independent growers provided in relevant part (App., *infra*, 2a-3a):

> B. THE GROWER AGREES:
>
> 1. To furnish the necessary housing, equipment, fuel, water, shavings or litter, electricity, labor, and other facilities or items that are necessary in the opinion of the Producer to raise the birds to marketable weight.
>
> 2. To utilize his best skill, judgment, and knowledge in caring for and rearing the birds.
>
> * * * * *
>
> 4. To be present during the catching or removal of the broilers and to raise and move, prior to the arrival of

at that point that the employees at issue here, the "live haul" crew, enter the picture. J.A. 28a, 32a.

Holly Farms' live haul crews are made up of about 150 workers. J.A. 32a. Each crew consists of one live haul driver, one forklift operator, and several chicken catchers. J.A. 4a-7a, 13a, 28a, 36a. The live haul driver transports the crew on a flat-bed truck to the independent growers' farms. There, the chicken catchers manually capture the broiler chicks and place them in steel cages; the forklift operator lifts the cages onto the truck; and the driver returns with the loaded cages and the crew to the processing plant. Pet. App. A41, A230 n.54, A831; J.A. 13a-14a. At the processing plant, the driver drives the truck onto scales and then proceeds to an unloading dock, where other employees unload the cages. Pet. App. A820 n.285, A831 & n.291. In the course of a shift, each live haul crew typically makes several trips between the processing facility and the independent growers' farms. See *id.* at A831-A832.

2. On February 16, 1989, Chauffeurs, Teamsters and Helpers Local Union No. 391, a/w International Brotherhood of Teamsters, AFL-CIO (the Union) filed a representation petition with the National Labor Relations Board (Board), seeking an election in a unit consisting of Holly Farms' hatchery employees; the Wilkesboro live haul employees; and the service center mechanics, feed haul employees, and feed mill employees at a Holly Farms facility in

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live haul, the equipment to insure proper care of the equipment and facilities.

Although this contract was not formally moved into evidence in the Board proceeding, it was the subject of testimony before the Board and was marked as an exhibit.

Roaring River, North Carolina. J.A. 19a, 22a-23a, 37a-38a; Pet. App. A211-A212, A233.[3] Holly Farms urged the Board's Regional Director to dismiss the Union's petition on the ground that all of the employees in the proposed unit were "agricultural laborer[s]" excluded from the definition of "employee" under Section 2(3) of the National Labor Relations Act (NLRA or Act), 29 U.S.C. 152(3). J.A. 19a.

The Regional Director concluded that the Wilkesboro live haul employees are not "agricultural laborer[s]." J.A. 22a. He explained that "the Board has consistently held that when an employer contracts with farmers for the care and feeding of the employer's chicks, the employer's status as a farmer engaged in the raising of poultry ends with respect to those chicks." *Ibid.* (citing *Imco Poultry*, 202 N.L.R.B. 259 (1973)). He dismissed the Union's petition, however, concluding for other reasons that the Union had not proposed an appropriate bargaining unit. J.A. 23a.

On review of the Regional Director's decision, the Board found that the Wilkesboro live haul employees and the employees working at the Roaring River facility constituted an appropriate bargaining unit, and the Board directed an election in that unit. J.A. 44a; Pet. App. A211-A212, A233-A235.[4]

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[3] The Roaring River facility included a feed mill operation, at which feed mill employees produced feed that was delivered by feed haul drivers to the farms of independent growers where pullets, broilers, and hens were raised. J.A. 4a, 6a-7a.

[4] The Board also held that Holly Farms' hatchery employees, including the egg haulers and pullet haulers, are agricultural laborers. J.A. 21a-22a, 43a.

3. On July 27, 1989, the Board conducted an election in the unit that it had determined in the representation proceeding was appropriate. The election resulted in a 95 to 95 tie, with one determinative challenged ballot. Pet. App. A235, A818-A819. The Union filed election objections and unfair labor practice charges against petitioners. *Id.* at A208-A209 n.48, A213-A215. The Board's General Counsel issued complaints against petitioners, which were later consolidated with the Union's election objections and the ballot challenge. *Id.* at A208 n.48.

After a hearing, an administrative law judge (ALJ) sustained the challenge to the determinative ballot cast in the July 27, 1989, election; the election thus ended in a tie. Pet. App. A818-A819, A856-A857. The ALJ found that petitioners had committed "many serious violations" of the NLRA that precluded the holding of a fair rerun election. *Id.* at A816.[5] In addition, he found that the Union had achieved majority status in the unit, which it had demonstrated by signed authorization cards. See *id.* at A789. Based on those findings, the ALJ ordered petitioners to recognize and bargain with the Union as the representative of the Wilkesboro live haul and Roaring River employees, pursuant to *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969). Pet. App. A794, A919. Relying on the Board's determination in the representation proceeding, the ALJ rejected petitioners' renewed contention that the Wilkesboro live haul employees are "agricultural laborer[s]" excluded from the NLRA's coverage. *Id.* at A786-A787.

[5] The ALJ found that petitioners' officials at the Wilkesboro facility had violated Section 8(a)(1) of the NLRA, 29 U.S.C. 158(a)(1), by, among other things, threatening employees with arrest for distributing union literature on company property in non-work areas during non-work time, repeatedly interrogating employees regarding their union sympathies, and threatening employees with retaliation for wearing union insignia; and had violated Section 8(a)(3), 29 U.S.C. 158(a)(3), by, among other things, discriminatorily granting a pay increase before the election. Pet. App. A795-A796, A876, A878, A880, A883.

The Board upheld the ALJ's unfair labor practice findings and his entry of a *Gissel* bargaining order. Pet. App. A134-A163, A182-A183. In rejecting petitioners' challenge to the *Gissel* order, the Board (with one member dissenting) relied on its prior determination in the representation proceeding that the Wilkesboro live haul employees are not "agricultural laborer[s]." *Id.* at A83 n.8.

4. The court of appeals (with one judge dissenting in part) enforced the Board's order. Pet. App. A1-A53. As relevant here, the court upheld the Board's determination that the Wilkesboro live haul employees are not "agricultural laborer[s]." *Id.* at A52.

Relying on *Bayside Enterprises, Inc.* v. *NLRB*, 429 U.S. 298 (1977), the court of appeals explained that, under the NLRA, "agriculture is defined in both a primary and a secondary sense": "[t]he primary meaning encompasses farming in all its branches, including the raising of poultry," while "the secondary meaning includes any practices, whether or not themselves farming practices, which are performed either by a farmer or on a farm, incidental[] to or in conjunction with primary farming operations." Pet. App. A44-A45 (internal quotation marks omitted). The court remarked that petitioners conceded that the Wilkesboro live haul employees do not engage in "primary" farming activi-

ties. *Id.* at A46. The court sustained the Board's determination that they also do not engage in "secondary" farming activities. *Id.* at A52. The court reasoned that the live haul employees' activities occur after "the Company has turned the broiler chicks over to independent contract growers and the Company's status as a farmer engaged in raising poultry (a primary agricultural activity) has ended." *Id.* at A48. The court held that those activities thus are not incidental to any primary farming operations on the part of petitioners. *Id.* at A48-A49.

SUMMARY OF ARGUMENT

I. The National Labor Relations Act (NLRA or Act) defines the term "employee" to exclude "agricultural laborer[s]." 29 U.S.C. 152(3). To be an "agricultural laborer" for purposes of the Act, a worker must engage in "[a]griculture," as that term is defined in Section 3(f) of the Fair Labor Standards Act (FLSA), 29 U.S.C. 203(f). See, *e.g.*, *Bayside Enterprises, Inc.* v. *NLRB*, 429 U.S. 298, 300 n.6 (1977). As this Court has explained, Section 3(f) of the FLSA defines "[a]griculture" to mean farming in a "primary" and a "secondary" sense. See, *e.g.*, *Bayside*, 429 U.S. at 300.

Petitioners did not argue before the National Labor Relations Board (Board) or the court of appeals that their "live haul" crews engage in primary farming. See Pet. App. 46a. Thus, the only question that this Court should address is whether the Board reasonably concluded that the live haul crews also do not engage in secondary farming.

II. The Board reasonably concluded that petitioners' live haul crews do not engage in secondary farming.

A. The text of Section 3(f) indicates that secondary farming must meet three requirements: (1) it must be performed either "on a farm" or "by a farmer"; (2) it must be performed "as an incident to or in conjunction with" primary farming operations; and (3) those primary farming activities must be ones that are performed either by the same farmer who undertakes the putative secondary farming activity or on the same farm where the putative secondary activities occur. 29 U.S.C. 203(f).

Petitioners' live haul drivers do not meet the first requirement. They do not work "on a farm"; they merely drive to and from the farm. Moreover, neither their work nor that of the other members of the live haul crews (the chicken catchers and forklift operators) is performed "by a farmer." Under the Board's *Imco Poultry* rule, which this Court upheld in *Bayside Enterprises, Inc.* v. *NLRB*, 429 U.S. 298, 302 n.9 (1977), Holly Farms ceases to act as a farmer when it turns the broiler chicks over to the independent growers. It does not resume its foregone "farmer" status when, 49 days later, it dispatches the live haul crews to the independent growers' farms to collect the mature chickens. At that point, Holly Farms is engaged in chicken-processing, which is not primary farming.

Even if we assume arguendo that the live haul crews meet the first requirement, they nonetheless do not engage in secondary farming because they do not meet the second and third requirements. If their work is deemed to be performed "by a farmer" (*i.e.*, Holly Farms), their work must be incidental to some primary farming activity by Holly Farms. That condition is not satisfied. Moreover, if it is recognized (as is the case) that the chicken catchers and fork-

lift operators work "on a farm," their work may qualify as secondary farming only if it is incidental to the independent grower's poultry-raising operations. The Board reasonably concluded that the work of the chicken catchers and forklift operators is not incidental to those operations, because the live haul crews' work begins only after the independent growers' work ends. The live haul crews play no role in the growers' discharge of their contractual responsibilities, and the growers take no part in the work of the live haul crews.

Petitioners argue that the chicken catchers and forklift operators engage in secondary farming because they are involved in the "preparation for market" of the chickens; and that the live haul drivers are involved in the "delivery to market" of the chickens. Those arguments ignore that, under Section 3(f), the practices of preparing a product and transporting it to market constitute secondary farming only if they are performed "by a farmer or on a farm as an incident to or in conjunction with" the primary farming operations of that farmer or on that farm. 29 U.S.C. 203(f).

B. Although petitioners rely on the legislative history of the phrase "or on a farm" in Section 3(f), it sheds no light on the question presented here.

C. The Department of Labor's regulations interpreting Section 3(f) of the FLSA support the Board's conclusion in this case. Those regulations make clear that the proper analysis focuses on whether the work of petitioners' live haul crew is performed "as an incident to or in conjunction with" the primary farming operations of the independent growers. The regulations also make clear that it is more accurate to characterize the live haul crews' work as incidental

to Holly Farms' chicken-processing operation (which is not primary farming) than to the growers' farming operations.

III. Petitioners seek to argue for the first time in their opening brief on the merits that the chicken catchers and forklift operators are engaged in primary agriculture. Petitioners' failure to advance that argument before the Board precludes its consideration in judicial proceedings to review the Board's decision. See 29 U.S.C. 160(e); *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665-666 (1982). In any event, petitioners' primary farming argument is without merit. Petitioners argue that the work of the chicken catchers and the forklift operators is analogous to the "harvesting" (29 U.S.C. 203(f)) of a crop. The statutory definition of "[a]griculture," by its terms, precludes the analogy. The statute sets forth "the raising of * * * poultry" and other animals in a separate clause from the one that includes the term "harvesting." *Ibid.* That structure indicates that the term "harvesting" refers to the process of collecting crops of plants, not animals.

IV. The Board's conclusion that the workers on petitioners' live haul crews are "employee[s]," rather than "agricultural laborer[s]," under Section 2(3) of the NLRA is entitled to "considerable deference." *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883, 891 (1984); see *Bayside*, 429 U.S. at 302.

ARGUMENT

THE BOARD REASONABLY DETERMINED THAT PETITIONERS' CHICKEN CATCHERS, FORKLIFT OPERATORS, AND LIVE HAUL DRIVERS ARE "EMPLOYEE[S]," RATHER THAN "AGRICULTURAL LABORER[S]," UNDER SECTION 2(3) OF THE NATIONAL LABOR RELATIONS ACT

The rights afforded to workers by the National Labor Relations Act (NLRA or Act) extend only to a worker who falls within the Act's definition of an "employee." See *NLRB* v. *Town & Country Electric, Inc.*, 116 S. Ct. 450, 453 (1995). Section 2(3) of the Act provides that "[t]he term 'employee' * * * shall not include any individual employed as an agricultural laborer." 29 U.S.C. 152(3). The question before this Court is whether the Board reasonably concluded that the workers in petitioners' "live haul" crews are "employee[s]," rather than "agricultural laborer[s]," under Section 2(3) of the Act and are therefore within the Act's coverage.

I. TO BE AN "AGRICULTURAL LABORER," A WORKER MUST ENGAGE IN EITHER "PRIMARY" OR "SECONDARY" FARMING

The NLRA itself does not define the term "agricultural laborer" for purposes of Section 2(3) of the Act. As this Court has observed, however, "[a]nnually since 1946, Congress, in riders to the Appropriations Acts for the [National Labor Relations] Board, has tied the definition of 'agricultural laborer' in § 2(3) of the NLRA to § 3(f) of the [Fair Labor Standards Act (FLSA)]." *Bayside Enterprises, Inc.* v. *NLRB*, 429 U.S. 298, 300 n.6 (1977); see Pub. L. No. 103-333, Tit. IV, 108 Stat. 2570 (1994) (unnumbered section) (Board's current appropriations Act).

Section 3(f) of the FLSA ties the definition of "agricultural laborer" to that of "[a]griculture," which is defined as follows (29 U.S.C. 203(f)):

> "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 1141j(g) of title 12), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

As this Court has explained, the definition of "[a]griculture" in Section 3(f) of the FLSA "includes farming in both a primary and a secondary sense." *Bayside*, 429 U.S. at 300; accord *Farmers Reservoir & Irrigation Co.* v. *McComb*, 337 U.S. 755, 762-763 (1949). Farming in its primary sense is defined in the first part of Section 3(f), as including "the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities * * * [and] the raising of livestock, bees, fur-bearing animals, or poultry." 29 U.S.C. 203(f). "[S]econdary farming" (*Bayside*, 429 U.S. at 301) is defined in the second part of Section 3(f), as including "any practices * * * performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, deliv-

ery to storage or to market or to carriers for transportation to market." Thus, "[t]he raising of poultry is primary farming, but hauling products to or from a farm is not primary farming. Such hauling may, however, be secondary farming if it is work performed 'by a farmer or on a farm as an incident to or in conjunction with such farming operations.'" *Bayside*, 429 U.S. at 301.

Petitioners did not argue before the Board or the court of appeals that the live haul crews engage in primary farming. Pet. App. A46. The only question properly before this Court therefore is whether the Board reasonably concluded that the live haul crews also do not engage in secondary farming. We show in Point II, *infra*, that the Board's conclusion is reasonable. We show in Point III, *infra*, that petitioners' "primary farming" argument, if considered, should be rejected.

II. THE BOARD REASONABLY CONCLUDED THAT PETITIONERS' LIVE HAUL CREWS DO NOT ENGAGE IN SECONDARY FARMING

A. The Board's Conclusion Is Consistent With the Text of Section 3(f) of the FLSA, as Construed by This Court

1. To constitute secondary farming under Section 3(f) of the FLSA, an activity must meet three conditions. First, the activity must be performed either "by a farmer" or "on a farm." 29 U.S.C. 203(f). Second, the activity must be performed "as an incident to or in conjunction with" primary farming activities. *Ibid.* Third, those primary farming activities must be ones that are performed either by the same farmer who undertakes the putative secondary

farming activity or on the same farm where the putative secondary activities occur. See *ibid.*

As this Court has explained, the third requirement is imposed by the use of the word "such" in Section 3(f)'s definition of "[a]griculture." *Farmers Reservoir*, 337 U.S. at 766 n.15. Secondary farming by a farmer or on a farm must be incidental to "such" primary farming activities as are undertaken by that farmer or on that farm, respectively. See *ibid.* For example, if a farmer processed not only commodities produced on his or her own farm but also commodities produced by other farmers, the processing of the other farmers' commodities would not constitute secondary farming. *Ibid.*

2. Petitioners do not contend that the live haul drivers work "on a farm," nor could they do so; the live haul drivers merely drive to and from the farms of the independent growers.[6] Petitioners do contend (Pet. Br. 33; see also Amicus Br. of American Farm Bureau *et al.* (AFB Br.) 11-12) that the live haul drivers' work, as well as that of the chicken catchers and the forklift operators, is done "by a farmer." In support of that contention, petitioners argue that Holly Farms acts as a farmer when it dispatches the live haul crews to the farms of the independent growers. Pet. Br. 31. That argument cannot be squared with this Court's decision in *Bayside*.

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[6] In contrast to petitioners, amicus National Broiler Council (NBC) does assert (NBC Br. 9) that the live haul drivers "assist the chicken catchers" on the growers' farms. The record contains testimony by one live haul driver indicating that he assisted in chicken catching on occasion, but not as part of his regular job duties. That evidence does not support the broad conclusion that the live haul drivers work "on a farm." *Cf.* Pet. App. A58 (Niemeyer, J., dissenting).

Bayside was an integrated poultry operation that bred and hatched chicks on its own farms but contracted with independent growers to raise the chicks to maturity for slaughtering at Bayside's processing plant. *Bayside*, 429 U.S. at 299, 301-302. The question before the Court was whether the work of the truck drivers employed by Bayside who hauled poultry feed from Bayside's feed mill to the farms of the independent contract growers constituted work done "by a farmer" for purposes of Section 3(f) of the FLSA. *Bayside*, 429 U.S. at 301-304.

The Court upheld the Board's determination that the drivers' work was not performed "by a farmer." *Bayside*, 429 U.S. at 302-304. The Court held that the Board had reasonably "rejected the argument that all of the activity on a contract farm should be regarded as agricultural activity of an integrated farmer such as Bayside." *Id.* at 302. In doing so, the Court specifically sustained the Board's *Imco Poultry* rule, 202 N.L.R.B. 259, 260 (1973), which provides that, "when an employer contracts with independent growers for the care and feeding of the employer's chicks, the employer's status as a farmer engaged in raising poultry ends with respect to those chicks." *Bayside*, 429 U.S. at 302 & n.9.

In a straightforward application of the *Imco Poultry* rule here, the Board likewise concluded that Holly Farms' status as a farmer ends when its broiler chicks are delivered to the farms of the independent growers. The work of the live haul crew with respect to those chicks does not begin until after the growers have raised the chicks to maturity. At that point, Holly Farms has ceased to act as a farmer. Thus, none of the work of the live haul crews (including

that of the chicken catchers and forklift operators) is done "by a farmer."

Petitioners argue (Pet. Br. 32) that *Bayside* "does not control" this case because petitioners' live haul crews "actually perform the agricultural tasks of catching, caging, loading and delivering to market." That argument falls short of the mark, however. Practices such as catching chickens and delivering them to market may constitute secondary farming if performed "by a farmer." But if such work is not performed "by a farmer" (or "on a farm"), it cannot constitute secondary farming.[7]

3. Whether or not this Court accepts our submission that the work of the live haul crews is not done "by a farmer," their work does not meet the second and third requirements for secondary farming.

a. If the Court agrees with our submission that the work of the live haul crews is not done "by a farmer," it is unnecessary to analyze the work of one component of the crew, the live haul drivers, because it is undisputed by the parties (see p. 15 and note 6, *supra*) that the live haul drivers also do not work "on a farm." The Board's conclusion that

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[7] Contrary to AFB's contention (AFB Br. 10-11), *Mitchell* v. *Budd*, 350 U.S. 473 (1956), does not require a contrary conclusion. See also NBC Br. 10. The Court in *Mitchell* held that, when a farmer grew tobacco on its own farm and processed that tobacco (and only that tobacco) in its off-farm bulking plant, "the agriculture operation * * * end[ed] * * * with the delivery of the tobacco at the receiving platform of the bulking plant." 350 U.S. at 481. The present case poses the analytically *prior* question of whether Holly Farms is properly regarded as a farmer at all when the mature chickens are collected, cooped, and delivered from growers' farms to petitioners' processing plant.

those drivers are not agricultural laborers would therefore have to be upheld.

We do not dispute that the chicken catchers and forklift operators work "on a farm" (29 U.S.C. 203(f)): the farms of the independent growers. It is also undisputed that the independent growers' operations constitute primary farming: "the raising of * * * poultry" (29 U.S.C. 203(f)). However, for the work of the chicken catchers and forklift operators to constitute secondary farming by virtue of its performance on a farm, it must meet the second and third requirements: namely, it must be performed "as an incident to or in conjunction with" the operations of the independent growers. 29 U.S.C. 203(f); see pp. 14-15, *supra*.

The Board reasonably concluded that the work of the live haul crew is not incidental to the independent growers' operations. The growers conduct their operations under contracts that require them to raise petitioners' chicks until they are 49 days old. At that point, the chicks are mature and ready for processing, and the growers' operations end. It is only at that point, however, that the live haul crew's work begins. The live haul crew thus plays no role in the growers' discharge of their contractual duties. Nor do the independent growers exercise any control over the live haul crew (who at all times remain petitioners' employees) or otherwise take any part in its work.[8]

[8] Petitioners err in asserting (Pet. Br. 25-26) that the Board's construction of the phrase "incident to or in conjunction with such farming operations" focuses on the ultimate motivation of Holly Farms to market processed chicken at a profit and is therefore inconsistent with *Maneja* v. *Waialua Agricultural Co.*, 349 U.S. 254 (1955). Holly Farms' profit motive is not germane to the Board's construction of the statutory phrase. Moreover, *Maneja* is distinguishable from the present case. The Court in that case held that railroad workers who hauled farm implements and field laborers between their employer's sugar cane fields and its mill were agricultural laborers. *Maneja*, 349 U.S. at 260-263. The hauling was plainly performed "on a farm as an incident to or in conjunction with such farming operations" under Section 3(f), because the employer's mill, railroad tracks, and fields were all located on the employer's sugar plantation, and only cane grown in those fields was processed at the mill. 349 U.S. at 256-257.

Thus, although the live haul crews' work comes on the heels of the independent growers' operations, it is more accurately characterized as the first step of petitioners' chicken-processing operation, rather than as the last step of the independent growers' primary farming operations. See *Draper Valley Farms, Inc.*, 307 N.L.R.B. 1440 (1992). Accordingly, the Board reasonably concluded that the live haul crews' work is incidental to petitioners' processing operation, which, as explained below, is not primary farming. See p. 21, *infra*; see also *Bayside*, 429 U.S. at 301; 29 C.F.R. 780.126.[9]

[9] Amicus NBC argues (Br. 13 n.5) that it was irrational for the Board to classify pullet haulers, but not chicken catchers, as agricultural laborers. The Board could reasonably distinguish between those two categories of workers, however, on the ground that the chicken catchers' work was performed in conjunction with Holly Farms' processing operation, which was not primary farming activity, see *Bayside*, 429 U.S. at 301, whereas the pullet haulers' work was performed in conjunction with Holly Farms' poultry-raising operation, which was primary farming activity, see 29 U.S.C. 203(f). See J.A. 22a (concluding that egg haulers and pullet haulers are agricultural laborers because, "[a]lthough hauling, generally,

b. If the Court rejects our submission that the work of the live haul crew is not performed "by a farmer," that determination would reflect acceptance of petitioners' contention (Pet. Br. 31) that Holly Farms acts as a farmer when it sends the live haul crews to the independent growers' farms. Even under that theory, however, to meet the second and third requirements for secondary farming, the crews' activities would have to be performed "as an incident to or in conjunction with" some *primary* farming operation conducted by Holly Farms.

The crews' activities are not performed incidentally to any primary farming operation by Holly Farms. Although the independent growers' poultry-raising operations qualify as primary farming, under this Court's decision in *Bayside* the independent growers' operations cannot be attributed to Holly Farms. See 429 U.S. at 300-302 (upholding Board's view that the primary farming activities of independent growers are not attributable to integrated poultry company).

Moreover, the crews' work could reasonably be characterized as incidental to Holly Farms' processing operation. Indeed, Holly Farms' "live production" manager testified that the crews' work is the first step of the processing operation. J.A. 29a. The Court in *Bayside* recognized, however, that poultry-processing is not primary farming. See 429 U.S. at

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would appear to be a non-farming activity, the employees making pickups in the circumstances presented here, particularly considering the process and functional integration in the hatchery, are similarly engaged in the exempt activity of raising poultry").

301. The Department of Labor has similarly recognized that "[t]he activities of the * * * [poultry] processor are not 'raising of poultry.'" 29 C.F.R. 780.126; see also 29 C.F.R. 780.125(b) ("Slaughtering, which is the antithesis of 'raising,' is not included" in the " 'raising of poultry.' ").

Holly Farms does engage in primary farming operations when its employees hatch the eggs of the broiler chicks that are delivered to the independent growers' farms. See J.A. 10a-12a, 21a. But those operations end on the day that the chicks are hatched. J.A. 12a. The live haul crews' work does not begin until 49 days later, after the chicks have been raised to maturity by the independent growers. J.A. 13a. The work of the crew is too remote from the hatchery operations to be incidental to those primary farming operations.

Hence, even if, contrary to our submission, the Court determines that Holy Farms was acting as a farmer when it sent the live haul crews to the independent growers' farms, the crews' work is not secondary farming because it is not performed incidentally to any primary farming operation by Holly Farms.

4. Petitioners argue (Pet. Br. 19, 23) that the chicken catchers and forklift operators engage in secondary farming because they are involved in the "preparation for market" of petitioners' chickens; and (*id.* at 30) that the live haul drivers engage in secondary farming because they are involved in the "delivery * * * to market" of the chickens. See also NBC Br. 11-12; Amicus Br. of California Agricultural Labor Relations Board (CALRB Br.) 18. Those arguments ignore the text of Section 3(f) of

the FLSA. Section 3(f) lists "preparation for market" and "delivery * * * to market" among the specific "practices" that constitute "[a]griculture" only if performed "by a farmer or on a farm as an incident to or in conjunction with" the primary farming operations conducted by the farmer or on the farm. 29 U.S.C. 203(f). As explained above, the live haul crew's work falls outside Section 3(f) because it is not performed incidentally either to any primary farming operation by Holly Farms, or to the independent growers' operations.[10]

B. The Board's Conclusion Is Consistent With the Legislative History of Section 3(f) of the FLSA

Although petitioners rely heavily (Pet. Br. 15-19) on the legislative history of Section 3(f) of the FLSA, it does not support them. The legislative history cited by petitioners explains the origin of the phrase "or on a farm" in Section 3(f). It does not cast doubt on the Board's conclusion, based on a different portion of Section 3(f), that petitioners' live haul crews do not engage in secondary farming because their work is not performed "as an incident to

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[10] Amicus NBC argues (Br. 12) that "catching chickens on a farm and delivering them for processing is unquestionably 'incident to or in conjunction with' the raising of poultry, just as harvesting wheat * * * is incidental to the raising of that commodity." It is not enough, however, to be able to say in the abstract that a practice is "incident to" a primary farming activity. Rather, the practice must be "incident to" the primary farming operation of the farm on which the practice occurs, or, if performed by a farmer, "incident to" that farmer's primary farming operations. See pp. 14-15, *supra*. Neither condition is met in this case.

or in conjunction with" the independent growers' operations.

In the bill originally introduced in the Senate, "[a]griculture" was defined to include "any practices ordinarily performed by a farmer as an incident to such farming operations." 81 Cong. Rec. 7653 (1937). As this Court explained in *Farmers Reservoir*, the phrase "or on a farm" was inserted after the phrase "by a farmer" by an amendment on the Senate floor (337 U.S. at 767 (footnotes omitted)):

> As originally introduced, the exemption covered such practices only if performed by a farmer. On the floor of the Senate it was objected that this would exclude the threshing of wheat or other functions necessary to the farmer if those functions were not performed by the farmer and his hands, but by separate companies organized for and devoted solely to that particular job. To take care of that situation the words "or on a farm" were added to the definition. Thus, the wheat threshing companies, even though they were separate enterprises, were included in the exemption because their work was incidental to farming and was done on the farm.

The Court in *Farmers Reservoir* made particular reference to the objection of Senator Tydings, who stated:

> In the case I visualize . . . the farmer is not performing the service. The man to whom I refer makes a business of doing nothing but threshing. He owns his own machine, and hauls it from farm to farm, and enters into contracts with farmers to thresh their crops; the point being that while he is dealing with an agricul-

> tural commodity, he is not necessarily a farmer, and he is not doing work ordinarily done by a farmer.

Id. at 767 n.16 (quoting 81 Cong. Rec. 7653 (1937)).

As petitioners observe (Pet. Br. 14-15), the legislative history clearly shows that "Congress intended that the definition of an agricultural laborer would include nonfarmers so long as their work involved primary farming activities or occurred on a farm and was incidental to the farming operations of the farm." While that history illuminates the purpose of the "or on a farm" phrase, it does not directly address the portion of Section 3(f) that is of central concern here: the phrase "as an incident to or in conjunction with such operations." 29 U.S.C. 203(f).

The threshing-machine operation described in the legislative history, which was considered by at least some legislators to constitute secondary farming, differs significantly from the work of petitioners' live haul crews. First, the live haul crew is not part of an enterprise that is in the "business of doing nothing but" providing chicken catching and transportation services. Rather, the activities of the live haul crew are merely the first part of petitioners' chicken-processing operation, which itself is only part of petitioners' vertically integrated poultry operation. Second, the chickens collected and transported by the live haul crew belong to petitioners, not the independent growers. See J.A 5a, 6a, 29a; Pet. Br. 31. While Congress may have intended by adding the phrase "or on a farm" to reach the employees of an independent contractor hired by a farmer to perform a service for the farmer, such as threshing the farmer's wheat, the legislative history does not

demonstrate that Congress intended to sweep within the agricultural exemption workers who (as here) enter onto a farm to perform a service, not for the farmer upon the farmer's commodities, but for an industrial firm upon the industrial firm's commodities. The Board could therefore reasonably conclude that such workers' activities are not performed "as an incident to or in conjunction with" the primary farming operations of those farms. 29 U.S.C. 203(f). Instead, such workers are properly regarded as industrial workers entitled to the NLRA's protection, rather than agricultural laborers.

C. The Board's Conclusion Is Consistent With the Department of Labor's Regulations Interpreting Section 3(f) of the FLSA

The Board's conclusion accords with the Department of Labor's interpretive regulations, which the Board seeks to follow "whenever possible," *Camsco Produce Co.*, 297 N.L.R.B. 905, 908 & n.14 (1990) (quoting *Imperial Garden Growers*, 91 N.L.R.B. 1034, 1037 (1950)), and which "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944).

The Department of Labor regulation addressing the present situation, entitled "Contract arrangements for raising poultry," states as follows (29 C.F.R. 780.126):

> Feed dealers and processors sometimes enter into contractual arrangements with farmers under which the latter agree to raise to marketable size baby chicks supplied by the former who also undertake to furnish all the required feed and possibly additional items. Typically, the feed

> dealer or processor retains title to the chickens until they are sold. Under such an arrangement, the activities of the farmers and their employees in raising the poultry are clearly within section 3(f) [of the FLSA]. The activities of the feed dealer or processor, on the other hand, are not "raising of poultry" and employees engaged in them cannot be considered agricultural employees on that ground. Employees of the feed dealer or processor who perform work on a farm as an incident to or in conjunction with the raising of poultry on the farm are employed in "secondary" agriculture (see §§ 780.137 *et seq.* and *Johnston* v. *Cotton Producers Assn.*, 244 F. 2d 553).

Under this regulation, as under the Board's decision, the status of petitioners' live haul crews depends upon whether they engage in secondary farming, which in turn depends upon whether they "perform work on a farm as an incident to or in conjunction with the raising of poultry on the farm." 29 C.F.R. 780.126. Other Department of Labor regulations confirm the Board's conclusion that the live haul crews do not engage in secondary farming because their work is not performed "as an incident to or in conjunction with" the independent growers' poultry-raising operations.

In keeping with the text of Section 3(f) (see pp. 14-15, *supra*), the regulations provide that secondary farming must meet three requirements (29 C.F.R. 780.129) (bracketed numerals added):

> To come within this secondary meaning, [1] a practice must be performed either by a farmer or on a farm. [2] It must also be performed either in connection with the farmer's own farming operations or in connection with farming

> operations conducted on the farm where the practice is performed. [3] In addition, the practice must be performed "as an incident to or in conjunction with" the farming operations.

The first and third requirements are readily evident on the face of Section 3(f). As the regulations explain, the second ("in connection with") requirement is derived from Section 3(f)'s use of the word "such." See 29 C.F.R. 780.141; see also pp. 14-15, *supra*.

As discussed above, petitioners' live haul drivers do not meet the first requirement; they do not work "on a farm," and their work is not done "by a farmer." See pp. 17-18, *supra*; see also 29 C.F.R. 780.134 ("Any practice which cannot be performed on a farm, such as 'delivery to market,' is necessarily excluded [from secondary agriculture] * * * when performed by someone other than a farmer." (citations omitted)). In any event, none of the workers on the live haul crews meets the second ("in connection with") and third ("incident to") requirements prescribed in the Department of Labor's regulations.

With regard to the "in connection with" requirement, the regulations state (29 C.F.R. 780.143):

> The fact that a practice performed on a farm is not performed by or for the farmer is a strong indication that it is not performed in connection with the farming operations there conducted.

The regulations add that, in determining whether a practice is performed "for" a farmer, it is "highly significant" whether the practice involves property to which the farmer has title or for which the farmer otherwise has responsibility. *Ibid.* As discussed

above, the live haul crews' work involves property that belongs to petitioners, not the independent growers.[11] Moreover, Holly Farms has not been retained by the independent growers to render the independent growers any service; rather, the growers have been hired by Holly Farms to perform a service for Holly Farms: raising the chicks to maturity. The live haul crews' work begins only after the independent growers' responsibilities have ended. See pp. 18-19, *supra*. That work is therefore not performed "in connection with" the independent growers' operations.

With regard to the "incident to" requirement, the regulations state in relevant part (29 C.F.R. 780.144):

> The line between practices that are and those that are not performed "as an incident to or in conjunction with" such farming operations is not susceptible of precise definition. Generally, a practice performed in connection with farming operations is within the statutory language only if it constitutes an established part of agriculture, is subordinate to the farming operations

[11] If, in contrast to the facts of this case, the chicken catchers and forklift operators of an independent contractor were hired by a grower to cage and load chickens both raised and owned by the grower, the work of the chicken catchers and forklift operators might be characterized as being performed "for" the grower, and therefore to occur "in connection with" the grower's poultry-raising operations. Cf. 29 C.F.R. 780.136 (whether employees of independent contractors who work on a farm are engaged in secondary agriculture "depends, of course, on whether the practices are performed as an incident to or in conjunction with the farming operations on the particular farm").

> involved, and does not amount to an independent business.

The work of the live haul crew is in no sense subordinate to the independent growers' operations. As explained above, the live haul crew plays no role in the independent growers' discharge of their contractual responsibilities, nor is the live haul crew under the direction of the independent growers.[12] Accordingly, even if the live haul crew's work were deemed to occur "in connection with" the independent growers' operations, it would not constitute secondary farming under the Department of Labor's regulations because it is not incidental to those operations.

Petitioners err in relying (Pet. Br. 23) upon a regulation that defines "preparation for market" to include "[c]ulling, grading, cooping, and loading" of poultry. 29 C.F.R. 780.151(k). Another regulation "emphasize[s] that 'preparation for market,' like other practices, must be performed 'by a farmer or on a farm as an incident to or in conjunction with such farming operations' in order to be within section 3(f)." 29 C.F.R. 780.150. The latter regulation makes clear that, to constitute secondary farming, it is not enough that an activity prepares a product for market; the activity must, in addition, occur "as an

[12] Cf. *Bayside Enterprises, Inc.*, 216 N.L.R.B. 502, 505 (1975) (work of truck drivers employed by integrated poultry producer, who delivered and unloaded poultry feed on farms of independent growers, was incidental to the operation of the employer's feed mill rather than the growers' farms), aff'd, 429 U.S. 298 (1977); *NLRB* v. *Samuel B. Gass*, 377 F.2d 438, 443-444 (1st Cir. 1967) (same; court notes that "[i]t is significant that these drivers are not employed or paid by the farms nor are they under the control of the farmers").

incident to" and "in connection with" primary farming operations.

Petitioners also err in relying (Pet. Br. 27-28) on the decision cited in 29 C.F.R. 780.126, *Johnston* v. *Cotton Producers Ass'n*, 244 F.2d 553 (5th Cir. 1957). See also NBC Br. 21; CALRB Br. 13. Johnston was employed by a retail store that sold baby chicks, feed, and other supplies to farmers. *Johnston*, 244 F.2d at 554. The court held that he was exempt from the FLSA as an agricultural laborer because "[s]ubstantially all of [his] work was done as a part of or in connection with the preparation for market * * * of poultry raised on farms." *Id.* at 555. Unlike Holly Farms' live haul crews, which play no role in the independent growers' poultry-raising operations, Johnston not only caught, cooped, and loaded the chickens onto trucks but also "supervise[d] the growing of the chicks by growers on their farms." *Id.* at 554. Moreover, unlike Holly Farms, the retail store that employed Johnston had no use for the mature chicks; it retained title to the chicks simply as security for the purchase price of the chicks and other material sold to the farmers. *Ibid.* The mature birds in *Johnston*, once cooped and caught, were delivered to third-party processors, not to the retail store. See *ibid.* Under those circumstances, it was reasonable to conclude that the employee's activities were performed "as an incident to or in conjunction with" the growers' operations. That conclusion does not conflict with the Board's contrary conclusion in the quite different circumstances of this case.

III. PETITIONERS' "PRIMARY FARMING" ARGUMENT SHOULD NOT BE CONSIDERED BECAUSE IT WAS NOT RAISED BELOW; IN ANY EVENT, IT CONFLICTS WITH THE TEXT OF THE STATUTE AND THE DEPARTMENT OF LABOR'S INTERPRETIVE REGULATIONS

Petitioners and some of their amici argue that the chicken catchers and forklift operators (but not the live haul drivers) engage in primary farming by "harvesting" an "agricultural commodity." Pet. Br. 29-30; AFB Br. 8-9; NBC Br. 9, 17. This Court should decline to consider petitioners' "primary farming" argument. If the argument is considered, it should be rejected.

A. Petitioners did not advance a primary farming argument before the Board or the court of appeals, and neither the Board nor the court addressed it.[13] Petitioners also did not raise the primary farming argument in their petition for a writ of certiorari; it appears for the first time in their opening brief on the merits. Cf. Sup. Ct. R. 24(a) (brief on the merits "may not raise additional questions or change the substance of the questions already pre-

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[13] Although petitioners did not expressly "concede" the primary farming issue, as the court of appeals believed (Pet. App. A46), they did not raise that issue at all. Instead, they made only a secondary farming argument. See Pet. C.A. Opening Br. 12 ("[T]he activities of catching, caging, and loading live chickens onto a truck for delivery are clearly incidental to or in conjunction with the primary farming practice of raising poultry on those farms."); Pet. C.A. Reply Br. 18 ("The thrust of Petitioners' position with regard to the chicken catchers and forklift operators is that they perform work on a farm that is incidental to the farming activities performed by the owner of the farm.") (emphasis omitted).

sented").[14] The question whether chicken catchers and forklift operators engage in primary farming is analytically distinct from the question whether they engage in secondary farming. See pp. 12-14, *supra*. Each of those questions, moreover, is one that the Board should have an opportunity to consider in the first instance. See, *e.g.*, *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883, 891 (1984) ("the task of defining the term 'employee' is one that has been assigned primarily to the agency created by Congress to administer the Act") (internal quotation marks omitted). Under those circumstances, this Court should decline to consider petitioners' primary farming argument. See, *e.g.*, *Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 645-646 (1992). Indeed, petitioners' failure to advance their primary farming argument before the Board creates a statutory bar to its consideration in judicial proceedings reviewing the Board's order. See 29 U.S.C. 160(e) ("No objection that has not been urged before the Board * * * shall be considered by the [reviewing] court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."); *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665-666 (1982) (holding that under 29 U.S.C. 160(e) the court of appeals "was without jurisdiction to consider" an issue "not raised during the proceedings before the Board").

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[14] Petitioners framed the question presented in a manner that could be read to encompass a "primary farming" argument. See Pet. iv ("Are chicken catchers, forklift drivers, and live-haul drivers of a vertically integrated poultry producer considered agricultural employees under Section 2(3) of the National Labor Relations Act ('NLRA' or 'Act'), 29 U.S.C. § 152(3) (1973)?") (question 5). In the body of their petition, however, petitioners asserted only a secondary farming argument. See Pet. 60-61.

B. In any event, petitioners' contention that the chicken catchers and forklift operators are engaged in "harvesting" poultry conflicts with the text of Section 3(f) of the FLSA and the Department of Labor regulations interpreting the statute.

Section 3(f) differentiates "the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities" from "the raising of livestock, bees, fur-bearing animals, or poultry." 29 U.S.C. 203(f). If the practices of "cultivation, growing, and harvesting" applied to poultry, then the statutory phrase "the raising of * * * poultry" would be superfluous. That result should be avoided. See, *e.g.*, *Astoria Fed. Savings & Loan Ass'n* v. *Solimino*, 501 U.S. 104, 112 (1991). To avoid it, Section 3(f) must be construed to make only the "raising" (and not the "harvesting") of poultry a primary farming activity.

The chicken catchers and forklift operators do not "raise" the poultry that they catch and load onto trucks. The poultry has already been "raised" by the independent growers. Under the explicit wording of the statute, therefore, the chicken catchers and forklift operators are not engaged in primary agriculture. See *Draper Valley Farms, Inc.*, 307 N.L.R.B. 1440 (1992); accord 29 C.F.R. 780.125(b) ("The 'raising' of poultry includes the breeding, hatching, propagating, feeding, and general care of poultry.").

Petitioners' contrary argument (Pet. Br. 29-30) rests on a misreading of the Department of Labor's interpretive regulations. The regulations define the term "agricultural commodities" to include "domesticated animals and some of their products." 29 C.F.R. 780.112. The regulations also state that " '[h]arvesting' does not extend to operations subsequent to and unconnected with the actual process whereby agricul-

tural commodities * * * are severed from their attachment to the soil or otherwise reduced to possession." 29 C.F.R. 780.118(b). Reversing that negative formulation, petitioners argue that harvesting must include all operations in which "agricultural commodities," including "domesticated animals" such as poultry, are "reduced to possession." Pet. Br. 29.

Although petitioners' argument is plausible in isolation, it fails to take into account the positive definition of "harvesting" in the regulations (29 C.F.R. 780.118(a)):

> The term "Harvesting" as used in section 3(f) [of the FLSA] includes all operations customarily performed in connection with the removal of the crops by the farmer from their growing position.

The regulation goes on to confirm that "harvesting" is an activity performed upon non-animal agricultural commodities, such as "the cutting of grain, the picking of fruit, the stripping of bluegrass seed, and the digging up of shrubs and trees grown in a nursery." *Ibid.* While the "harvesting" of some non-crop agricultural commodities, such as fish, may constitute "farming" (see *Domsea Farms, Inc.*, 211 N.L.R.B. 832 (1974); 29 C.F.R. 780.109)), "farming," as applied to poultry, is limited by statute to the "raising of * * * poultry." 29 U.S.C. 203(f).

IV. THE BOARD'S DETERMINATION THAT PETITIONERS' LIVE HAUL EMPLOYEES ARE NOT "AGRICULTURAL LABORER[S]" IS ENTITLED TO DEFERENCE

This Court has repeatedly recognized that the Board's interpretation of the term "employee" in Section 2(3) of the NLRA "is entitled to considerable deference." *Sure-Tan*, 467 U.S. at 891; see also,

e.g., *Town & Country Electric, Inc.*, 116 S. Ct. at 453; *NLRB* v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786-787 (1990). In addition, the Court has stated that the Board's construction of the exemption for agricultural laborers in Section 3(f) of the FLSA "is one we must respect even if the issue might 'with nearly equal reason be resolved one way rather than another.'" *Bayside*, 429 U.S. at 302 (quoting *Farmers Reservoir*, 337 U.S. at 770 (Frankfurter, J., concurring)).[15] Where, as in this case, the Board's conclusion that particular employees are not "agricultural laborer[s]" reflects a reasonable interpretation of the text of Section 3(f) and is consistent with the legislative history of that provision, the Board's prior decisions, and the Department of Labor's construction of the statute, "the appropriate weight which must be given to the judgment of the agency whose special duty is to apply this broad statutory language to varying fact patterns requires enforcement of the Board's order." *Bayside*, 429 U.S. at 303-304; see also *NLRB* v. *Transportation Management Corp.*, 462 U.S. 393, 401-402 (1983); *NLRB* v. *Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170, 189-190 (1981).

Moreover, because Section 3(f) defines an area partially exempted from the regulatory framework established by the FLSA,[16] it must be "narrowly con-

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[15] This Court's decision in *Bayside* forecloses petitioners' argument (Pet. Br. 11-12) that the Board's interpretation of Section 3(f) is not entitled to deference. See also NBC Br. 20; AFB Br. 19.

[16] See, *e.g.*, FLSA Section 13(a)(6), 29 U.S.C. 213(a)(6) (partial exemption from minimum wage and overtime pay provisions for certain employees employed in "agriculture" as defined by Section 3(f)); see generally 29 C.F.R. 780.100.

strued against the employers seeking to assert [it]" and its application must be limited to those falling "plainly and unmistakably within [its] terms and spirit." *Arnold* v. *Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960); accord *A. H. Phillips, Inc.* v. *Walling*, 324 U.S. 490, 493 (1945). It cannot be said that Holly Farms' chicken catchers, forklift operators, and live haul drivers fall "plainly and unmistakably" within the Section 3(f)'s agricultural exemption. The Board's determination that these employees are NLRA "employees" is therefore entitled to affirmance.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FREDERICK L. FEINSTEIN
General Counsel

LAWRENCE G. WALLACE
Deputy Solicitor General

LINDA SHER
Associate General Counsel

RICHARD H. SEAMON
Assistant to the Solicitor General

NORTON J. COME
Deputy Associate General Counsel

JOHN EMAD ARBAB
Attorney

National Labor Relations Board

JANUARY 1996

APPENDIX

WILKESBORO DIVISION
Effective 2/4/85

AGREEMENT

THIS AGREEMENT made this the —— day of ————————, 19—, by and between Holly Farms Poultry Industries, Inc., a North Carolina corporation, hereinafter referred to as the "Producer," and ————————————, hereinafter————————— referred to as the "Grower."

WITNESSETH:

THAT WHEREAS, Holly Farms Poultry Industries, Inc. is engaged in the production of poultry on an integrated basis, being responsible for the rearing of chickens from the breeder hens to the processing of the poultry into dressed product; and

WHEREAS, the Grower has represented himself as an experienced and knowledgeable person in the field of rearing poultry, possessing skill and knowledge to supervise and direct the efficient rearing of broilers; and

WHEREAS, the Producer desires to utilize the professed skill, judgment, discretion and knowledge of the Grower on a contractual basis for the production of broilers for use in its processing plants; and

WHEREAS, the compensation of the Grower is predicated upon the skill, knowledge and discretion which he agrees to utilize and purports to possess in

the production of the chickens under his control and supervision; and

WHEREAS, the Grower warrants that he is the owner of or in the possession of a farm together with improvements located thereon, sufficient and adequate for use in rearing chickens or broilers.

NOW, THEREFORE, in consideration of these premises and the mutual agreements herein set out, the parties do hereunto agree as follows:

A. THE PRODUCER AGREES:

1. To furnish and deliver baby chicks to the Grower's farm to be grown out as broilers subject to the termination right of either party as set forth hereinafter.

2. To furnish and deliver all feed and medication which the Producer, with the advice of the Grower, determines to be adequate and sufficient to rear the broilers to marketable weight.

3. To pay Grower in accordance with the formula or method hereinafter set out in this agreement on the following time schedule:

a. The Grower will notify the Producer when the unused feed may be picked up.

b. The Grower's settlement will be made within a period of fourteen (14) working days from the day the unused feed is picked up.

B. THE GROWER AGREES:

1. To furnish the necessary housing, equipment, fuel, water, shavings or litter, electricity, labor, and other facilities or items that are necessary in the

opinion of the Producer to raise the birds to marketable weight.

2. To utilize his best skill, judgment, and knowledge in caring for and rearing the birds. The Grower further agrees that no feed, chicks, or medication furnished by the Producer will be used for any purpose other than the rearing of birds under this agreement, and that in the event feed or other supplies remain in the feeders after the rearing of one flock, this feed or supplies will be utilized in the rearing of the next flock or returned to the Producer.

3. To permit at any time inspection of birds and growing facilities by the Producer or its agents.

4. To be present during the catching or removal of the broilers and to raise and move, prior to the arrival of live haul, the equipment to insure proper care of the equipment and facilities.

5. To exercise the necessary supervision and planning in order to provide properly maintained roads or passageways to poultry houses and around poultry houses.

6. To warrant that the Grower is the owner of the land, buildings, and equipment utilized in the rearing of the chickens or that the Grower is in the legal possession of the property and has the right and authority to utilize the same for this purpose.

C. THE PRODUCER AND THE GROWER JOINTLY AGREE:

1. That the delivery date and the number of baby chicks to be placed with the Grower will be determined by consultation and agreement between the Grower and the Producer with the final decision being made by the Producer.

2. That after the removal of each flock, the Grower will be paid in accordance with a method or formula as follows:

a. A figure to be known as the individual Grower's Efficiency Point Factor will be ascertained. The Grower's efficiency point factor will be calculated by determining the Grower's total number of net live weight pounds of poultry grown and the total efficiency points assigned for settlement purposes of the feed (580 points per 100 pounds), and chicks (20 points each) utilized in producing the broilers. After the Grower's efficiency points have been determined, the total number of pounds of broilers will be divided into the total efficiency points giving the efficiency point factor. The efficiency point factor ascertained by this division will constitute for settlement purposes the individual Grower's settlement based on the average of all grower's efficiency points whose broilers were moved in the same settlement period. (The average of all grower's efficiency points whose broilers were moved in the same settlement period is known as the "floating average.")

b. *Basic Grower Payment*

(1) The individual Grower's efficiency point factor per pound in relation to the floating average as ascertained by the method set out above will be applied to Exhibit A entitled "Basic Grower Payment Schedule." The applicable figures appearing in the column will be ascertained and payment will be made by applying the figures to the applicable column on

Exhibit A. For example, the average of all growers' efficiency points (floating average) whose broilers were moved in the same settlement period is 10.30 points, and the individual Grower's efficiency point factor is 10.00 points, then the individual Grower will receive floating average pay plus a .30 point equivalent lower than the floating average which scales out on Exhibit A to be $149.00 per thousand broilers sold. If the floating average is 16.30 points, then the individual Grower's efficiency point factor is 16.60 points, and the individual Grower will receive floating average pay less a .30 point equivalent higher than the floating average which scales out on Exhibit A to be $131.00 per thousand broilers sold.

(2) The settlement period for obtaining the floating average will be one week (Monday through Saturday's kill), but in no case will the settlement period contain less than 10 flocks. For example, when 8 flocks are moved in a particular week, two flocks would be added to these 8 flocks making up the 10-flock settlement group. The efficiency point factors used for these two flocks would be the same as the floating average efficiency point factor from the previous week.

(3) For the purpose of determining the weekly floating average, growers whose efficiency point factor is 1.50 points per pound more or less than the average for the settlement period will not be used for figuring grower pay other than his own.

(4) A copy of the composite Grower's efficiency points for determining the floating average will be available at the office of the Producer.

(c) *Market Advantage Bonus Payment.* A market advantage bonus payment will be paid

to the Grower based upon the Market Advantage Factor determined by reference to the chart attached hereto as Exhibit B and its relationship to the Monday Final Georgia Dock Market plus one cent. The Monday Final Georgia Dock Market plus one cent set forth on Exhibit C refers to the simple average of three quoted markets (Monday of the week of processing and the two previous Mondays). The prices set forth on Exhibit B refer to the quoted cash price per bushel of Chicago, Illinois #2 yellow corn and the quoted cash price per ton of Decatur, Illinois 49% soybean meal. These prices will be averaged on Monday of the week of processing for the previous three Mondays of trading and are not necessarily indicative of the price which the Producer pays for any and all of its corn and soybean meal. The market advantage factor as determined by Exhibit B is predicated upon the average consumption of corn and soybean meal per pound of dressed poultry, the average quoted market price of corn and soybean meal for the three Mondays immediately preceding the week of processing, and the estimated freight on the corn and soybean meal. The market advantage factor is then related to the Monday Final Georgia Dock Market plus one cent by use of the Market Advantage Bonus Payment Chart (Exhibit C) in order to determine the market advantage bonus payment per thousand birds processed. The Monday Final Georgia Dock Market plus one cent is used for convenience and is not necessarily indicative of the price at which the Producer sells its poultry products and the market advantage bonus payment chart includes

an estimated constant factor to cover all additional charges.

As an example in determining the market advantage bonus payment, assume corn price of $2.70 per bushel and soybean meal of $160.00 per ton. Exhibit B shows a market advantage factor of 15.38. Then assuming a Monday Final Georgia Dock Market plus one cent of 49.00 cents per pound, the market advantage bonus payment determined by use of Exhiibt C is $9.50 per thousand birds sold.

d. A settlement sheet prepared in accordance with the procedures hereinabove set out and reflecting the amount paid the Grower, the efficiency point factor per pound, the average of the Monday Final Georgia Dock Market price plus one cent of the Monday of the week of processing and the two previous Mondays; the average of the previous three Monday's daily prices on #2 yellow corn and 49% soybean meal; and other information will be furnished the Grower.

3. In the event of one hundred percent (100%) loss of all birds placed in any one house as a result of fire or disease not resulting from the negligence or intentional acts of the Grower, the Producer will pay the Grower $7.00 per thousand chickens placed for each week including fractions thereof which the Grower has had the chickens. For example, if fire destroys a house of 10,500 birds at five weeks and two days of age, the grower pay for this house is $388.50. A loss of eighty percent (80%) or more of the flock shall be interpreted for purposes of this paragraph as one hundred percent (100%) loss.

4. That for the convenience of not having to initiate a new agreement after each flock, this agree-

ment shall remain in full force and effect with the privilege on the part of either party to terminate the same after the removal of any particular flock. In the event of termination, the Producer shall have the right and privilege to enter the premises and remove any feed, medication, equipment, and other property belonging to the Producer.

5. In the event the Producer in its sole judgment shall determine that the flock or birds in possession of the Grower is deteriorating or that the Grower is failing to maintain the normal and ordinary growth, or in the event the Grower shall wrongfully dispose of feed, chicks, medication, or any other property of the Producer, then the Producer may engage a court of proper jurisdiction and obtain an injunctive or mandatory order authorizing the Producer to go upon the premises of the Grower and remove therefrom the birds, feed, medication, supplies, or other property belonging to the Producer. The Grower, under these circumstances, does hereby forfeit any compensation or payment he would otherwise receive with reference to this flock.

6. That title to feed, chicks, and medication furnished by the Producer is and shall remain the sole and exclusive property of the Producer.

7. The Producer and Grower are each independent contractors performing services using their separate discretion and judgment. The Producer and the Grower shall, in their separate and independent discretion, employ and supervise exclusively their own servants, agents and employees.

8. That Producer shall under no circumstances be held responsible for damages to Grower caused by delay or failure to perform hereunder when such delay or failure is due to fire, strikes, acts of God,

legal acts of public authorities or delays or defaults due to labor, feed, chick, or medication shortages.

The provisions of the paragraph are subject to and are not inconsistent with Part C, section 3, page 7, of this agreement. The Producer agrees to comply with the provisions of Part C, section 3, page 7 of this agreement.

IN WITNESS WHEREOF, the respective parties have hereunto, either in person or by their authorized agents, affixed their hands and seals hereto.

HOLLY FARMS POULTRY INDUSTRIES, INC.

By _____

Grower _____ (Seal)

Spouse _____ (Seal)

_____

Business Name or Account Name of Grower

_____

Address

( )

_____

Telephone Number Social Security or Identification Number

[Exhibits Omitted]

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